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No. 93-1663

In the Supreme Court of the United States

OCTOBER TERM, 1994

RANDELL P. MEANS, PETITIONER

v.

BRENDA CHILCUTT WORTHAM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals' affirmance of the district court's order that the discovery sanctions imposed on petitioner be non-reimbursable should be summarily reversed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 4 F.3d 1313. The orders of the district court (Pet. App. 31a-34a, 35a-36a, 37a-38a, 39a-43a, 44a-52a, 53a-54a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1993. A petition for rehearing was denied on December 22, 1993. Pet. App. 55a. On March 16, 1994, Justice Scalia extended the time for the filing of a petition for a writ of certiorari to and including April 21, 1994. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The primary claim advanced by petitioner is that the court of appeals improperly made findings of fact about petitioner's withholding of documents and information during the discovery stage of this case that were not made by the district court and that harmed petitioner's reputation. Pet. App. 16a. In light of that very fact-specific claim, a full statement of the facts and proceedings in this case is appropriate.

1. On October 4, 1988, respondent Chilcutt [1] slipped and fell on the floor of the River Bend Post Office in Fort Worth, Texas. In April, 1991, Chilcutt and Home Indemnity Company, the insurance carrier that had provided her with workers' compensation benefits, brought suit under the Federal Tort Claims Act against the United States, alleging that Chilcutt's fall resulted from the negligence of the United States in failing to maintain the floor in a safe condition.

2. After one extension of time, the district court set a discovery cut-off date of May 8, 1992, and scheduled trial for the week of June 8, 1992. In doing so, the court admonished the parties and counsel to cooperate in the discovery process and warned that violations would be subject to sanctions. On March 24, 1992, plaintiffs served a set of interrogatories and requests for production of documents on the government. The government's responses were due by April 23, 1992. Petitioner was the government's trial counsel. Although plaintiffs' counsel

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[1] After the beginning of this litigation, Brenda Chilcutt married and took the name Brenda Wortham. In order to conform to the petition and the references in the district court record, we refer to her as Brenda Chilcutt.

spoke to petitioner several times about these requests, both before and after the answers were due, and was assured that responses were forthcoming, no responses were filed by either the due date or the May 8 discovery cut-off date. On May 19, 1992, plaintiffs filed motions to compel discovery and for sanctions. Pet. App. 3a-4a & nn.2-3.

3. The district court scheduled a hearing on plaintiffs' motions to compel and for sanctions for May 22, 1992. On that date, petitioner served answers to plaintiffs' interrogatories and also produced some documents. Plaintiffs objected to the incompleteness of the government's interrogatory answers and the document production, as well as to the lateness of petitioner's responses. In response, the court ordered a deposition to be taken, at no expense to plaintiffs, of the independent janitorial contractor responsible for maintenance of the floor at the River Bend post office, the site of the accident. In addition, the court ordered that all remaining documents should be produced by May 27, 1992. Pet. App. 4a-5a.

The court deferred ruling on plaintiffs' requests for more serious sanctions at the May 22 hearing. The court did rule that it would award plaintiffs all of their expenses on the motion to compel—as well as their expenses to depose the independent contractor—to be paid personally by petitioner. The court observed that "I don't think that this sort of thing should be borne by the taxpayers." C.A. R.E. 38; see also Pet. App. 40a (repeating that justification in written order). The court also ordered petitioner to attach his own affidavit to the responses to the discovery requests stating that the documents he had produced constituted all the responsive documents within the government's possession and control. See Pet. App. 31a-33a.

Plaintiffs filed a statement of fees and expenses in litigating the motion to compel, amounting to more than $7,000. After a hearing on June 1, 1992, the court awarded fees and costs in the amount of $2,500, to be paid by petitioner by June 8, 1992. Pet. App. 35a-36a. The court ordered petitioner to file an affidavit stating that he paid the sanction "with his own personal funds and that he has not sought or received and will not seek or receive, reimbursement from the government for all or any part of such sum." Pet. App. 36a.

4. On June 1, 1992, plaintiffs filed a supplemental motion for sanctions, alleging that the government's production of documents was still inadequate. Among the subjects at issue in that motion, and at the hearing on the motion held on June 4, 1992, was an accident log maintained by postal employee Al Svede. In his original responses to plaintiffs' discovery requests, as well as at the May 22 hearing, petitioner had stated that such a log did not exist. However, when Svede had earlier been deposed, his testimony had indicated that such a log had been maintained. Thus, after testifying that postal employee Robert Kunkel maintained a log of accidents, C.A. R.E. 67, Svede added:

> Basically, all [Kunkel] does is he has a log that keeps all accidents, vehicular and non-vehicular. As far as being in litigation, that would be in my office * * *.

Id. at 67. Later in the deposition, Svede was asked whether he had any information about claims against the post office that had been denied after he had investigated them. He replied that:

> It's in the reports—I mean in my log. If there are claims filed, I have records. I believe our retention time is three years on those.

C.A. R.E. 74.

As a result of Svede's deposition testimony, plaintiffs expected to obtain Svede's log in response to their original document requests. When petitioner stated that the log did not exist, plaintiffs included the government's failure to produce the Svede log in their June 1 supplemental motion to compel production and for sanctions. On June 3, the government filed a response that referred to plaintiffs' "complain[t] that Al Svede has not produced his own log," and stated that:

> [The government] has certified, based upon the answer provided by Al Svede, that there is no record of any complaint of the type sought by Plaintiff's [document] request.

Pet. App. 7a n.11 (emphasis omitted).

5. During the morning session of the June 4 hearing, plaintiffs again asked for "[t]he accident log maintained by Mr. Svede." June 4 Tr. 46. The court then inquired why "those accident logs" had not been produced. June 4 Tr. 48; see Pet. App. 7a n.12. Petitioner responded that Chilcutt's accident was not recorded in "those logs." June 4 Tr. 48-49; see Pet. App. 7a n.12. After further inquiry by the court, petitioner stated:

> As our response to this supplemental motion states, I am stating under oath before the court as an officer of the court that my representations in that motion are correct, that a search of that log has been conducted, and no accident has been identified to the time periods in that

> log—and I believe it's 1987 through the present —for the premises, River Bend Finance Unit, for both employee accidents or complaints or customer accidents.

June 4 Tr. 50; see Pet. App. 8a n.12.

Plaintiffs had also sought production of "an additional document, a Form 1769," which they explained was "a standard accident report form that the post office uses" and which they claimed Chilcutt had filled out on the date of the accident and given to Iona Smith, a post office window clerk. June 4 Tr. 56, 57. Petitioner had initially justified the government's failure to produce this form on the ground that it did not exist. At the June 4 hearing, petitioner told the court that the government's position was that no such form had been filled out, and that Smith and others would corroborate that fact. June 4 Tr. 57. The court ordered that Svede and Smith should appear in court after the lunch break, together with "any document pertaining to this accident" that had not previously been produced, and the court stated that it "want[ed] to see each of the accident logs that we have been talking about." June 4 Tr. 59, 60.

Svede and Smith were contacted and told to appear in court that afternoon, and to bring with them any documents that had not yet been produced. Pet. App. 80a. When Svede met petitioner at the lunch break, he brought with him a log of post office accidents that had been on top of a filing cabinet in his office. The log contained a report of Chilcutt's accident. Pet. App. 63a-64a. Svede showed the log to petitioner before the court began the afternoon session of the hearing. Pet. App. 63a.

When the court reconvened at 2:00 that afternoon, plaintiffs stated that they wanted to examine Iona

Smith. The court itself conducted the primary questioning of Smith. June 4 Tr. 78-83. She testified that the only form she ever filled out concerning Chilcutt's accident was a "Form 13." June 4 Tr. 82-83. In response to plaintiffs' counsel's questions, she specifically denied that Chilcutt had given her a Form 1769 on the day of the accident. June 4 Tr. 86.

Al Svede was then called to the stand. The court conducted the initial questioning of Svede. June 4 Tr. 89-94. Svede stated that a Form 1769 had been filled out for Chilcutt's accident, and that he had a copy of it. June 4 Tr. 93. Then, in response to plaintiffs' counsel's questions, Svede stated that the Form 1769 "is not a form I produce" and that he "can't recall" where he saw the Form 1769. June 4 Tr. 95. Petitioner briefly questioned Svede about another matter. June 4 Tr. 97-98.

The court then asked for copies of the Form 1769, the "listing in the accident log that the witness said he prepared," and other items. June 4 Tr. 100. Petitioner stated that he had the accident log, but that he did not have the Form 1769. *Ibid.* The court then asked Svede where he saw the Form 1769, and Svede replied:

> That's just—I don't know where. It is just that I think that I have seen one. But, like I said, I have seen—I am not sure—

Ibid. He also stated that he did not know when he had seen the Form 1769. *Ibid.*

Petitioner asked Svede to produce the accident log and some other documents, and they were provided to the court. June 4 Tr. 100. After the court examined Svede's accident log and found the reference in it to Chilcutt's accident, the court asked petitioner why Svede's log had not previously been produced to

plaintiffs. Petitioner stated that the log "is not covered by any document production request or subpoena duces tecum." June 4 Tr. 105. However, the court ruled that the log was in fact called for by the plaintiffs' document requests. June 4 Tr. 109. The court also noted that the log contains entries for various falls in lobbies of other post offices, which could have led to further lines of investigation by plaintiffs. June 4 Tr. 107-108.

Chilcutt herself then took the stand. She testified that she filled out a Form 1769 on the afternoon of the accident and returned it to Iona Smith at the post office that day. June 4 Tr. 112. Then, a friend of Chilcutt's testified that she had gone with Chilcutt to the post office on the day of the accident, that Chilcutt had picked up a "report," and that Chilcutt's supervisor at work told her to leave work early that day to "go by the post office to turn it in." June 4 Tr. 130. The friend did not testify concerning the contents of the "report," nor did she claim to have seen Chilcutt give it to Smith or anyone else at the post office.

In closing argument, petitioner continued to disagree with the court concerning whether the Svede accident log was responsive to plaintiffs' discovery requests. June 4 Tr. 143. He also stated that he "would submit that accident log page was not withheld as a result of any trickery or improper motive on the part of the defendant United States." June 4 Tr. 144. He went on to say that "personally and professionally as counsel, it was, as discussed in the—." *Ibid.* At that point, the court informed him that he was out of time. *Ibid.*

The court then stated that severe sanctions against the government would be warranted because of the government's delay in filing timely responses to plain-

tiffs' discovery requests, which in the court's view had delayed plaintiffs' preparation for trial. June 4 Tr. 145-147. The court further found that the government had failed to provide all responsive documents in response to the court's May 22 order. In particular, the court stated that it "can't imagine why that accident log was withheld because there is no question but what it was called for by the requests for production and was obviously known to people that were working on the case on behalf of [the government]." June 4 Tr. 148. As a sanction, the court ruled that the elements of plaintiffs' prima facie case would be taken as proven, although the government would be allowed to prove any affirmative defenses it might have. June 4 Tr. 151-152. Ultimately, after a trial that centered on the damages issue, the court entered judgment for plaintiffs in the amount of $892,567.

6. On July 1, 1992, the district court entered a sealed order expressing concern "with certain representations concerning discovery matters" by petitioner. Pet. App. 44a. The court stated that those representations "were factors the court considered in deciding on the severity of the sanctions" in this case. *Ibid.* The court said that its review of the transcripts "heightened" its concern. *Ibid.* The court stated that "[t]he area of greatest concern has to do with apparent misrepresentations by [petitioner] to the court about the accident log" prepared by Svede. Pet. App. 45a. The court proceeded to recount some of the events of the June 4 hearing. Pet. App. 46a-51a. The court concluded that it "might well" be the case that petitioner was guilty of contempt of court, incompetence, or signing certifications in violation of Fed. R. Civ. P. 11, or that petitioner had "subjected himself to disciplinary action under the inherent

powers of the court." Pet. App. 51a-52a. In view of the seriousness of the charges, however, the court stated that it "intends to proceed with special caution." Pet. App. 52a. The court ordered that a hearing be held, at petitioner's option, to "giv[e] [petitioner] opportunity to explain his conduct," prior to any show-cause contempt hearing that might ultimately be held. *Ibid.*

A hearing for this purpose was held on July 28, 1994. At the hearing, petitioner and Svede testified that there had been two different sets of logs on which accidents were recorded, one maintained by Svede and another maintained by postal safety officer Kunkel. Pet. App. 63a-67a, 77a, 93a. Petitioner testified that, before the afternoon of June 4, he had known only of the Kunkel log, which he had reviewed and which contained no entry for Chilcutt's accident. Pet. App. 83a, 88a, 95a. Although Svede's reference to the existence of his own log at his deposition had triggered plaintiffs' repeated efforts to obtain it, petitioner testified that each time plaintiffs asked for the log, he had understood them to be asking for Kunkel's log, which was not responsive to plaintiffs' document requests because it contained no reference to any accident at the River Bend Post Office. Pet. App. 95a-98a, 99a-110a. Petitioner testified that he first found out about the Svede log when Svede showed it to him during the lunch break of the June 4 hearing. Pet. App. 93a, 102a. Petitioner did not explain why he did not immediately bring the Svede log to the attention of the court when it reconvened after lunch on June 4, in view of the erroneous answer petitioner had given about the existence of the log at the morning hearing. Nor did petitioner explain why he had continued to argue, on the afternoon of June 4, that the Svede log was not responsive to plaintiffs' dis-

covery requests when the log was in fact responsive to those requests. Petitioner's counsel explained that petitioner had "panicked" and made a "shoot-from-the-hip" argument. Pet. App. 105a; see also Pet. App. 60a.

At the conclusion of the July 28 hearing, the court "state[d] some initial reactions." Pet. App. 106a. The court said at the outset that "[o]ne of two conclusions has to be reached: [petitioner] either is totally incompetent as an attorney, or he made blatant misrepresentations to the court." *Ibid.* The court stated that it "[thought] Mr. Svede is basically being honest," but that it was "taking his testimony with a little bit of a grain of salt because of the unlikelihood that he would remember the details of the things that were said between him and [petitioner] back at that time." Pet. App. 114a. The court stated that it thought

> it more likely that [petitioner] was telling it the way it was when he referred in the documents that we have talked about to Mr. Svede's own log, and that [petitioner] knew Mr. Svede had a log.
>
> And I think it likely, almost a certainty, that [petitioner] was representing to the court intentionally that Mr. Svede's own log didn't report the accident in question.
>
> And, of course, that raises the possibility or the prospect that the reason Mr. Svede's log was concealed is that it disclosed other accidents that occurred in a close proximity from a time standpoint.

Ibid.

The court then concluded:

> I have decided I'm not going to pursue the matter of criminal contempt further. I think that

> this is a case where a court could find beyond a reasonable doubt the elements of criminal contempt, but I guess, in a sense, I am giving [petitioner] the benefit of the doubt and simply am not going to pursue that.

Pet. App. 116a.

Later in the day on July 28, the court issued a written order. The court stated: "Having heard the evidence and arguments presented, the court determined that, whether the conduct was intentional or grossly negligent, entry of the following order would be appropriate." Pet. App. 53a. The order entered unsealed all orders that had been issued in this case, included a transcript of the July 28 hearing in the record on appeal in the event of an appeal, required petitioner to attend 15 hours of courses on ethics or professional responsibility, and required petitioner individually and without reimbursement to pay plaintiffs' counsel an additional $625, which represented plaintiffs' counsel's fee for attending the July 28 hearing. Pet. App. 53a-54a.

7. On appeal, the United States, on behalf of itself and petitioner, argued for reversal of both the sanctions against the United States and the non-reimbursement order imposed upon petitioner. The court of appeals affirmed both sanctions.

a. Reviewing the facts of the case, the court of appeals stated that petitioner had, prior to June 4, denied the existence of "an accident log which the plaintiffs claimed Mr. Svede * * * maintained." Pet. App. 4a. The court described the log, which was in the Record Excerpts before the court, see C.A. R.E. 63-66, as "apparently contain[ing] information about remedial actions taken by the USPS in response to Ms. Chilcutt's accident, as well as information on

other accidents which occurred at the River Bend location." Pet. App. 5a n.6. The court also stated that the information "was quite beneficial to" plaintiffs "[b]ecause the same contractor cleaned all of the post offices in the Fort Worth area." Pet. App. 4a n.5. Referring to the July 28 hearing, the court stated that petitioner "claimed at [the July 28] hearing that he had never *seen* the log and had not known that it existed prior to the June 4 hearing." Pet. App. 10a (emphasis in original). The court added:

> The district court thought otherwise, concluding that he could find that the elements of criminal contempt were proved beyond a reasonable doubt. The court determined that [petitioner] had intentionally misrepresented to the court that Mr. Svede's log did not report Ms. [Chilcutt]'s accident. However, giving [petitioner] the "benefit of the doubt," the court chose not to disbar him or hold him in criminal contempt.

Pet. App. 10a-11a. See also Pet. App. 9a (stating that the district court "further found that although the Government and the people working on the case knew that the log existed and that it was called for by the requests for production, the Government chose to withhold the documents in derogation of the discovery rules and the court's order compelling discovery").

The court also stated that petitioner had denied the existence of "a standard accident report ('Form 1769')." Pet. App. 4a-5a. The court said that, at the June 4 hearing, Svede "testified under oath that not only did the Form 1769 exist, *but that he possessed a copy of that form.*" Pet. App. 9a (emphasis in original). The court went on to state that, at the June 4 hearing, petitioner "presented *no* explanation

for his misrepresentation regarding Form 1769," and that:

> In fact, even though Mr. Svede, *the Government's representative*, testified under oath that such a form existed and that he possessed a copy thereof, [petitioner] and the Government—similar to the argument that windmills are dragons—persist in their quixotic claim that the form does not exist.

Pet. App. 9a n.13 (emphasis in original).

b. Citing this Court's decision in *Insurance Corp. of Ireland* v. *Compagnie Des Bauxites de Guinee*, 456 U.S. 694 (1982), the court ruled that the sanction imposed on the government was appropriate in this case. Pet. App. 13a. The court noted that the district court had provided fair warning to the government of the serious possible consequences of discovery violations. The court stated that "based upon the Government's flagrant violations of its discovery obligations, its flouting the district court's discovery order, and its blatant misrepresentation to the court, the Government should have been relieved that the court did not order a much stiffer penalty." Pet. App. 15a. The court also found that the sanction was warranted because the government had repeatedly promised plaintiffs that it would comply with the discovery requests, thus stringing plaintiffs' counsel along. The court stated that "the concealed log proved that numerous other customers had likewise fallen at the River Bend Post Office." Pet. App. 16a. See also Pet. App. 21a ("The district court determined that the only reason the Government withheld the accident log was to prevent the plaintiffs from learning that a number of other customers had also fallen in the River Bend Post Office.").

The government had argued that the sanction of taking the elements of plaintiffs' case as having been proven was tantamount to a default judgment, which could only be entered based on intentional misconduct. The court of appeals responded that, "[r]egardless of the proper *mens rea* standard" required for a sanction of the type imposed on the government, "the credible evidence in the record of this case reveals quite readily that the Government not only intentionally withheld documents that it knew existed, but it also knowingly made blatant misrepresentations to the district court about the existence of those documents." Pet. App. 17a-18a. The court added that "[t]here is ample evidence in the record to support" what it regarded as "the district court's conclusion that Mr. Svede also engaged in misconduct" by not producing the accident log. Pet. App. 19a. The court regarded Svede's testimony that he had "forgotten the log" as "incredible" if "considered alone," and "contrary to" what it regarded as "[petitioner]'s earlier testimony" at the June 4 hearing "that he had reviewed Mr. Svede's log and had determined that it was not responsive to the plaintiffs' requests for production." *Ibid.* The court characterized the government's defense of Svede's claim of forgetfulness as "ludicrous." Pet. App. 20a. Finally, the court noted that the harsh sanction against the government was appropriate because it followed a previous, less harsh sanction, Pet. App. 20a-21a, because it was related to the claim plaintiffs sought to prove through the withheld document, Pet. App. 21a-22a, and because it was necessary to achieve appropriate punishment and deterrence, Pet. App. 22a-23a.

c. In a separate portion of its opinion, the court of appeals also affirmed the nonreimbursement orders imposed on petitioner. The court held that it was

appropriate under the Federal Rules of Civil Procedure to impose discovery sanctions of that kind on government attorneys in the same circumstances in which such sanctions would be imposed on private attorneys, and that such sanctions imposed on government attorneys do not violate separation of powers principles. Pet. App. 24a-29a. The court distinguished a case from another circuit reversing a nonreimbursement order on the ground, *inter alia*, that "the record in this case shows all too clearly that * * * th[e] district court's primary reason in precluding [petitioner] * * * from seeking reimbursement was to punish [petitioner] for his flagrant disregard of his discovery obligations." Pet. App. 27a n.35.

d. Judge Jones concurred in the opinion, except insofar as it suggested that restricting a district court's powers to sanction a government attorney would violate separation of powers principles. Pet. App. 29a-30a. In her view, the government had failed to show that petitioner would have qualified for reimbursement but for the district court order. Pet. App. 30a. She stated that the separation of powers concerns that the government had advanced were accordingly "too speculative." *Ibid.*

8. The United States filed a petition for rehearing. The petition argued that the court had made a number of factual errors in its opinion: (1) Although the court stated that the Svede logs contained information about other accidents at the postal facility where Chilcutt's fall took place and that they contained information about remedial actions taken by USPS, the logs in fact contained no record of any other accident at that facility (although they contained records of accidents at other facilities), nor did the logs contain any reference to remedial actions

taken by USPS. Pet. App. 122a, 125a. (2) Although the court stated that the log could have been useful to plaintiffs because the same contractor cleaned all of the post offices in the Fort Worth area, in fact none of the other accidents entered in the log occurred at post offices cleaned by the contractor who cleaned the River Bend post office. See Pet. App. 125a-126a. (3) Although the court stated that petitioner intentionally misrepresented the contents of the logs, the district court had made no such finding. See Pet. App. 123a. (4) Although the court took as proven the fact that a Form 1769 relating to Chilcutt's accident existed, the testimony of those involved was in conflict on that point and the district court had made no finding to resolve the conflict. See Pet. App. 128a-130a. The petition argued that accuracy in these matters was important, in light of the fact that "the public record of this case will reflect on the character of the individuals involved." Pet. App. 122a-123a; see also Pet. App. 131a. Finally, the petition argued that the court had erred in concluding *sua sponte* and without citation to any legal authority that attorney's fees for the appeal should be taxed against the government, where taxation of such fees could be justified only on the ground that the appeal was frivolous.[2] See Pet. App. 131a-132a.

The court denied the petition for rehearing. Pet. App. 55a.

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[2] The Fifth Circuit currently has under advisement plaintiffs' petition for an order confirming the award of fees and expenses and setting the amount due, as well as the government's opposition to that petition. The Fifth Circuit thus has not yet reached a final judgment on this matter.

ARGUMENT

1. We agree with petitioner that the court of appeals misstated some facts in this case. The court of appeals made such errors in three portions of its opinion:

First, the court of appeals made some factual errors concerning the contents and significance of the Svede log. The court stated that the Svede log "apparently contained information about remedial actions taken by the USPS in response to Ms. [Chilcutt]'s accident, as well as information on other accidents which occurred at the River Bend location." Pet. App. 5a n.6. See also Pet. App. 16a n.21, 21a. The court also stated that the log would have been useful to plaintiffs because "the same cleaning contractor cleaned all of the post offices in the Fort Worth area and used the same type of wax on all of the floors." Pet. App. 4a n.5.

Those statements were mistaken. Although the Svede log contained information about similar accidents in the lobbies of other post offices in the area,[3] it contained no information about other accidents at the *River Bend* Post Office. The log also contained no information at all about remedial actions taken in response to accidents at any of the post offices. And there was no basis in the record for the statement that the same cleaning contractor cleaned all of the post office floors in the area; deposition testimony not before the court of appeals in fact demonstrated that the contractor who cleaned the River Bend post office floor did not clean any of the other

[3] Petitioner has reprinted one page of the Svede log at Pet. App. 120a. Both pages of the log were included in the record excerpts filed by the government in the court of appeals. See C.A. R.E. 63-66.

facilities mentioned in the Svede log. See Pet. App. 125a-126a & n.3.

Second, in a footnote the court of appeals characterized petitioner as having "presented *no* explanation for his misrepresentation regarding Form 1769." Pet. App. 9a n.13 (emphasis in original). The court commented that the government's denial of the existence of the Form 1769 was "similar to the argument that windmills are dragons" and was a "quixotic" claim. *Ibid.*

In fact, however, the evidence regarding Form 1769 was contradictory. Chilcutt testified that she filled out such a form and gave it to postal employee Iona Smith. A friend of Chilcutt's testified that Chilcutt had picked up a form at the post office and had been authorized to leave work early to return it. On the other hand, Smith denied that Chilcutt had given her such a form (although Smith mentioned that a different form had been filled out). Svede initially testified that a Form 1769 concerning Chilcutt's accident had been filled out and that he had it. June 4 Tr. 89-94. But he later equivocated, stating that "[i]t is just that I *think* that I have seen one" and stating that he did not know when or where he had seen it. June 4 Tr. 100 (emphasis added).

Third, the court stated that there was "ample evidence in the record to support the district court's conclusion that Mr. Svede also engaged in misconduct," and that his "testimony, when considered alone, is incredible." Pet. App. 19a. In fact, the district court's only conclusion with respect to Svede was that he was "basically being honest," although the court "[took] his testimony with a little bit of a grain of salt because of the unlikelihood that he

would remember the details of the things that were said between him and [petitioner]." Pet. App. 114a.

2. The court of appeals also stated that "[t]he [district] court determined that [petitioner] had intentionally misrepresented to the court that Mr. Svede's log did not report Ms. [Chilcutt]'s accident." Pet. App. 10a-11a. The court of appeals at several other places in its opinion mentioned intentional misrepresentation by petitioner, see Pet. App. 2a, 9a, 15a, 16a n.21, 21a.

In our view, the most accurate reading of the July 28 hearing transcript and the subsequent written order issued by the district court is that, although the district court believed that it had ample basis for finding that petitioner had been guilty of intentional misrepresentation with regard to the Svede log—and, indeed, at one point said that "I think it likely, almost a certainty, that [petitioner] was representing to the court intentionally that Mr. Svede's own log didn't report the accident in question," Pet. App. 114a—the court nevertheless did not make an express or formal finding that there had been intentional misrepresentation by petitioner on this issue. Thus, after the closing statement by petitioner's counsel at the July 28 hearing, the court stated that it would provide "some initial reactions." Pet. App. 106a. In the course of those reactions, the court stated, with regard to petitioner's statements about the Svede log, that

> the only conclusions I can reach from what I have heard, either that he just is absolutely totally incompetent or he has made some of the most serious misrepresentations a lawyer can make to a court, representing under his oath, as his words, something that is false.

Pet. App. 108a-109a. In specific response to petitioner's counsel's argument that "[petitioner] didn't

know [what he said] was false," the court expressed skepticism, noting that petitioner "used awful strong language, if he didn't know it was false." Pet. App. 109a. Nevertheless, the court remarked that "maybe that falls in the first category." *Ibid.* The court added: "So I've got a hard decision as to where I go from here. I don't want to embarrass the U.S. Attorney's office." *Ibid.* Ultimately, the district court decided:

> I'm not going to pursue the matter of criminal contempt further. I think that this is a case where a court could find beyond a reasonable doubt the elements of criminal contempt, but I guess, in a sense, I am giving [petitioner] the benefit of the doubt and simply am not going to pursue that.

Pet. App. 116a.

In its July 28 written order, the district court then stated that certain remedies and sanctions were appropriate "whether the conduct [of petitioner] was intentional or grossly negligent." Pet. App. 53a. Thus, although portions of the district court's comments could be read to have constituted a finding of intentional misrepresentation, the court of appeals was inaccurate if it meant to state that the district court had made a formal finding that petitioner had made such intentional misrepresentations.

3. Although the court of appeals' opinion thus contains some errors, summary reversal of its judgment affirming the sanctions imposed on petitioner is not warranted. The validity of the orders that petitioner not be reimbursed for sanctions totalling $3,125 in litigation costs incurred by plaintiffs as a result of petitioner's failures to meet discovery obligations is the only legal issue presently before this Court. The

court of appeals did not rest its affirmance of those nonreimbursement sanction orders on any incorrect findings of fact it made.[4]

The court of appeals began its opinion by distinguishing the two claims before it—one involving sanctions imposed on petitioner personally and the other involving sanctions imposed on the government as a party to the underlying litigation. Thus, the court first stated that, after the discovery dispute arose, the district court had "ordered [petitioner] to personally reimburse the plaintiffs for attorney's fees which arose from the Government's discovery abuse," Pet. App. 1a-2a, and that the district court had later imposed an additional nonreimbursable sanction on petitioner for plaintiffs' costs of attending the June 28 hearing, Pet. App. 11a. Second, the court stated that the district court had "deemed that the liability facts of the plaintiffs' case were established" when "the Government * * * attempted to deceive the court and the plaintiffs." Pet. App. 2a. After reviewing the facts of the case, the court separately discussed the merits of the sanction against the government and the sanctions against petitioner.

With respect to the sanction against the United States, the court plainly relied on its belief that petitioner had engaged in intentional misrepresenta-

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[4] Petitioner cites authority (Pet. 18 n.11) in support of the proposition that, even aside from the nonreimbursement orders, petitioner would have standing to contest the court of appeals' decision based on the damage done to his reputation by the court of appeals' opinion as a whole. But we do not read petitioner to rest his petition on that ground. Even if he did, the question whether petitioner would in fact have standing to challenge the court of appeals' opinion on that ground alone would be at least sufficiently uncertain to preclude summary disposition of this case.

tions.[5] The court catalogued the government's sanctionable conduct as follows: "[T]he Government's flagrant violations of its discovery obligations, its flouting the district court's discovery order, and its blatant misrepresentation to the court." Pet. App. 15a. See generally Pet. App. 12a-23a. The United States has not sought further review in this Court of the court of appeals' affirmance of the sanction against it.

The court of appeals then considered the two nonreimbursable sanctions imposed on petitioner in a section of its opinion entitled "Propriety of Sanctioning Mr. Means." Pet. App. 23a. The court noted that "[petitioner] does not argue that the district court abused its discretion in sanctioning him," but that "by forbidding him from seeking reimbursement from the U.S. Government, the district court violated the separation of powers doctrine." Pet. App. 23a. The court held that the nonreimbursement sanction was authorized by Fed. R. Civ. P. 37, Pet. App. 24a-

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[5] The court stated that the intent of the government was relevant in evaluating the sanction, and found that the government acted intentionally by, *inter alia*, "knowingly ma[king] blatant misrepresentations to the district court." Pet. App. 18a. The court attempted to refute the government's argument that it was not at fault, by making the finding that Svede was complicit in the alleged misconduct and misrepresentation. Pet. App. 19a. The court of appeals found that the district court was justified in deeming the plaintiffs' prima facie case proven, based on the principle that intentional withholding of evidence by the government justified an inference that the evidence would have disclosed a lack of merit in the government's case. Pet. App. 21a. Finally, the court of appeals justified the sanction against the government as necessary for penal purposes because the government's conduct was "willful, contumacious, and flagrant" and because the government was insufficiently "penitent." Pet. App. 22a-23a.

26a, and that "to *restrict* a district court's power to fashion appropriate sanctions, simply because the transgressor is a member of the executive or legislative branch, would violate the separation of powers doctrine." Pet. App. 27a (footnote omitted) (emphasis in original). See Pet. App. 27a-29a.

The court of appeals did not base its affirmance of the district court's nonreimbursement order either on the factual mistakes the court of appeals made in reviewing the record or on the supposition that the district court made a finding that petitioner had made intentional misrepresentations to the district court. Indeed, the court made clear that it understood that the nonreimbursement orders imposed on petitioner were unrelated to any intentional misrepresentations on his part.

The court of appeals thus explained that a nonreimbursable sanction was imposed on petitioner at the May 22 hearing for "discovery abuse," Pet. App. 2a, to pay for "th[e] deposition costs and all of the attorney's fees and other expenses the plaintiffs had incurred in preparing the [first] motion to compel and the [first] motion for sanctions." Pet. App. 6a.[6] Petitioner's supposed intentional misrepresentations did not occur until the June 4 hearing, about two weeks later, and therefore could not possibly have affected this sanction order. Pet. App. 7a-8a. An additional nonreimbursable sanction was imposed on July 28 "to reimburse [plaintiffs'] counsel for the time she had spent in the hearing." Pet. App. 11a.[7]

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[6] The sanction was imposed at the May 22 hearing, memorialized in a written order on May 26, see Pet. App. 31a-34a, and reduced to a sum certain of $2,500 in a written order on June 2, see Pet. App. 35a-36a.

[7] The amount of that sanction was $625. Pet. App. 54a.

The district court expressly stated that this small additional sanction would be "appropriate," regardless of "whether [petitioner's] conduct was intentional or grossly negligent." Pet. App. 53a.

Thus, the district court clearly did not base either of its two nonreimbursement orders on any facts or assumptions concerning intentional misrepresentations by petitioner. The court of appeals understood that fact, and there is no reason to believe that the court of appeals relied on any intentional misrepresentations by petitioner in adjudicating petitioner's appeal of the nonreimbursement orders.

In distinguishing a case from another circuit, the court of appeals remarked that "this district court's primary reason in precluding [petitioner] * * * from seeking reimbursement was to punish [petitioner] for his flagrant disregard of his discovery obligations." Pet. App. 27a n.35. That reference to "flagrant disregard of discovery obligations," however, apparently did not refer to intentional misrepresentations made by petitioner to the district court, but to his disregard of discovery obligations by failing to adhere to discovery time schedules and by his incomplete responses to discovery requests. Indeed, elsewhere in its opinion, the court of appeals referred to failures to comply with discovery obligations and intentional misrepresentations as constituting distinct types of violations.[8] And neither petitioner nor the United States contested the basic facts that presumably led the court of appeals to charac-

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[8] See Pet. App. 2a (referring to government's having "disobeyed the district court's order to fulfill its discovery obligations and attempted to deceive the court and the plaintiffs"), 15a (referring to government's "flagrant violations of its discovery obligations, its flouting the district court's discovery order, and its blatant misrepresentation to the court").

terize petitioner's actions as amounting to "flagrant disregard of discovery obligations." Those included the failure of the government to produce any discovery at all until May 19, 1992, approximately one month after the April 23 due date under the discovery rules, and its failure to produce complete discovery responses even at that late date.

Petitioner does not seek certiorari to address the separation of powers concerns that were the basis of the government's argument in the court of appeals against affirmance of the non-reimbursement order. Those concerns would not, in any event, lend themselves to summary disposition by this Court. On the other hand, petitioner "readily admits that he erred badly in failing to attend to discovery deadlines." Pet. 18 n.11. As shown above, it appears that the sanctions imposed on petitioner were based on that failure, and not on any of the appeals court's factual misapprehensions. Accordingly, we do not believe that the question presented warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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